

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 14, 2005

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing
Date of Filing: November 2, 2004
Case Number: TSO-0162

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ A local DOE Security Office (LSO) suspended the individual's access authorization pursuant to the provisions of Part 710. In this Decision I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be restored. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be restored.

I. Background

For several years, the individual has been employed in a position that requires him to hold a DOE security clearance. On December 19, 2002, the police arrested the individual and charged him with Driving Under the Influence (DUI) of alcohol, Careless Driving, and Criminal Damage to Property. The LSO conducted a Personnel Security Interview (PSI) with the individual on March 6, 2003 (March 2003 PSI) to obtain information regarding the circumstances surrounding the DUI arrest and the extent of the individual's alcohol use. After the PSI, the DOE referred the individual to a board-certified psychiatrist (DOE consultant-psychiatrist) for a forensic psychiatric evaluation. The DOE consultant-psychiatrist examined the individual in September 2003, and memorialized his findings in a report (Psychiatric Report or Exhibit 3). In the Psychiatric Report, the DOE consultant-psychiatrist opined that the individual suffers from alcohol abuse. The DOE consultant-psychiatrist also found that the individual did not present evidence of adequate rehabilitation or reformation.

In August 2004, the LSO initiated formal administrative review proceedings. The LSO first informed the individual that his access authorization had been suspended pending the resolution of certain derogatory information that created substantial doubt regarding his

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

continued eligibility to hold a security clearance. In a Notification Letter that it sent to the individual, the LSO described this derogatory information and explained how that information fell within the purview of one potentially disqualifying criterion. The relevant criterion is set forth in the security regulations at 10 C.F.R. § 710.8, subsection j (Criterion J).²

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations and requested an administrative review hearing. On November 5, 2004, the Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in this case. Subsequently, I convened a hearing within the regulatory time frame specified by the Part 710 regulations.

At the hearing, five witnesses testified. The LSO called one witness and the individual presented his own testimony and that of three witnesses. In addition to the testimonial evidence, the LSO submitted 22 exhibits into the record; the individual tendered 21 exhibits. On February 11, 2005, I received the hearing transcript (Tr.) at which time I closed the record in the case.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

² Criterion J relates to information that a person has “[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.” 10 C.F.R. § 710.8 (j).

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites one potentially disqualifying criterion as the basis for suspending the individual's security clearance, *i.e.*, Criterion J. The LSO provides the following information to support its reliance on Criterion J in this case. First, a DOE consultant-psychiatrist diagnosed the individual as suffering from alcohol abuse in September 2003. Second, the police have arrested the individual three times for incidents involving alcohol. Third, the individual's ex-spouse filed a Petition for Order Prohibiting Domestic Violence in 1998, citing information about the individual's excessive use of alcohol in her petition.

The information set forth above clearly constitutes derogatory information that raises questions about the individual's alcohol use. Excessive alcohol consumption is a security concern because the behavior can lead to the exercise of questionable judgment, unreliability, and a failure to control impulses, and can increase the risk that classified information may be unwittingly divulged. *See* Appendix B to Subpart A of 10 C.F.R. Part 710, Guideline G, ¶ 21.

IV. Findings of Fact

Most of the facts in this case are uncontested. Where there are discrepancies in the record, I will note them as appropriate.

The individual's excessive consumption of alcohol has resulted in his being arrested three times. The individual's first alcohol-related arrest occurred in the 1980s when he was 18 or 19.³ *Tr.* at 18, 25.

The individual's second alcohol-related arrest occurred in 1986 when he was arrested for Driving While Intoxicated (DWI). According to the record, the individual consumed four to five beers over a two to three hour period at a lounge before he attempted to drive

³ The individual admitted at the hearing that the arrest in question did in fact occur. However, he maintained that the arrest was "totally wrongful on the police's part." *Id.* at 25. The individual explained at the hearing that he had consumed "some" beers on the date in question after having played pool at a pool hall. *Id.* The individual testified that when he exited the pool hall, he and a friend discovered that the friend's car had been vandalized. *Id.* The individual related that his friend called the police to report the incident. *Id.* According to the individual, after the police arrived at the scene, the police arrested him for public intoxication. The individual testified that he spent the night in jail and then pled guilty to the charges so he could get released and go to work. *Id.* at 26.

home. Ex. 11 at 47. He does not remember the details leading up to the arrest. *Id.* at 48-50. He does, however, admit that he felt highly intoxicated before he decided to drive his vehicle on the date in question. *Id.* at 47. The individual testified that the charge connected with his 1986 DWI arrest was dismissed on a technicality. Tr. at 18, 29.

The most recent alcohol-related arrest occurred in December 2002. The circumstances surrounding this arrest are as follows. On December 18, 2002, the individual consumed between four and seven beers while bowling with friends. ⁴ Ex. 8 at 13. He left the bowling alley and started to drive home sometime after midnight on December 19, 2002. Ex. 20. In route home, the individual fell asleep while driving his vehicle. Ex. 8 at 17, Ex. 3 at 4. The individual apparently lost control of his vehicle causing it to veer off the road, hit a road sign, and blew out a tire. Ex. 8 at 20, Ex. 3 at 4. Immediately after the accident, the individual decided to leave his vehicle and walk home. Ex. 3 at 4. To keep warm, the individual reports that he consumed three miniature bottles of 101 proof liqueur⁵ as he started walking. *Id.* Soon thereafter, the police arrived on the scene of the accident and found the individual nearby. According to the police report, the police officer on the scene detected an odor of alcohol on the individual's breath. Ex. 20. At the request of the police officer, the individual performed a field sobriety test. *Id.* The individual failed the test. *Id.* The police called an ambulance to transport the individual to the hospital because he had a laceration on his head. *Id.* While at the hospital, the individual agreed to have his blood drawn and tested for alcohol. *Id.* The individual's blood alcohol level (BAC) measured .16. Ex. 8 at 28. Two hours later, the police administered a breathalyzer to the individual at the police station. *Id.* This time, the individual's BAC measured .14.

The individual pled guilty in March 2003 to the 2002 DUI charges. Ex. 19. The court dismissed the others charges connected with the December 2002 arrest as part of a plea arrangement. *Id.* The court ordered the individual to pay court costs and fees, undergo a Drug and Screening Assessment Evaluation, attend a DUI school, and remain on unsupervised probation until March 2004. *Id.*, Ex. 18.

In addition to the three alcohol-related arrests described above, the individual's ex-wife filed a Petition for Order Prohibiting Domestic Violence (Petition) against the individual on March 3, 1998 in which she complained of her ex-husband's alcohol use. Ex. 21. Specifically, the individual's ex-wife provided a sworn statement to accompany her Petition in which she attested that the individual "gets to my home at all hours. Squeals out driving drunk. He has my twelve year old drive because he is too drunk." *Id.* On March 4, 1998, a judge issued a Temporary Restraining Order Prohibiting Domestic Violence and Order to Appear to the individual. *Id.* One week later, on March 13, 1998,

⁴ The individual told the personnel security specialist in 2003 that he had consumed four beers between 6:00 p.m. and 11:45 p.m. on the night in 2002 that he was arrested,. Ex. 8 at 13. The individual told the DOE consultant-psychiatrist that he drank seven beers between 5:30 pm and 12:30 a.m on the night he was arrested. Ex. 3 at 4.

⁵ The individual claimed that he had purchased the three miniature liqueurs to give to friends. Ex. 8 at 21. It was for this reason, according to the individual, that he had the liqueurs in his possession when he drove his vehicle off the road. *Id.*

a judge issued an Order Prohibiting Domestic Violence based on the Petition filed on March 3, 1998 that is referenced above.⁶

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).⁷ After due deliberation, I have determined that the individual's access authorization should not be restored at this time. I cannot find that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. The Individual's Testimonial and Documentary Evidence

The individual admitted at the hearing that he has experienced problems with alcohol in the past. Tr. at 10. He argues, however, that he has reformed his ways and overcome his problems with alcohol.⁸ *Id.*

To support his position, the individual testified that he last consumed alcohol on Christmas Day in 2004. *Id.* at 30. He added that from the date he was arrested for DUI in December 2002 until March 2003, he abstained totally from alcohol. *Id.* at 31. The individual estimates that he has consumed alcohol on only five or six occasions in the last two years and has never been intoxicated during any of those times. *Id.* at 30, 33.

The individual testified that he attended 12 sessions with an alcohol counselor between May and July 2003. *Id.* at 41. The individual elected, however, not to call the alcohol

⁶ At the hearing, the individual claimed that he contested the charges filed by his ex-wife in court. He opined that the courts "really don't care to hear what actually happened, they just - - their job is to issue the order . . ." Tr. at 24.

⁷ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

⁸ The individual submitted no convincing evidence to refute the DOE consultant-psychiatrist's diagnosis that the individual suffers from alcohol abuse. The individual did dispute some of the source material cited by the DOE consultant-psychiatrist in his Psychiatric Report. *See* Ex. 3. The individual contends that the source information is incorrect. For example, the DOE consultant-psychiatrist noted in the Psychiatric Report that source information indicated that the individual was fired for drinking during working hours. Ex. 3 at 3. The individual testified that he was not fired from the job in question. Tr. at 49. According to the individual, he voluntarily quit because he had violated his company's zero tolerance policy for alcohol consumption during work hours. *Id.* At the hearing, the DOE consultant-psychiatrist testified that even if he did not have access to any source material, he still would have concluded that the individual suffers from alcohol abuse. *Id.* at 110. In view of the DOE consultant-psychiatrist's testimony, it is unnecessary for me to resolve the issues regarding the disputed source material.

counselor as a witness at the hearing. *Id.* As for why the individual did not follow the DOE consultant-psychiatrist's recommendation that he attend an outpatient program of one year's duration, the individual testified that he believed that he had addressed all his alcohol issues and did not need the outpatient program. *Id.* at 42.

The individual revealed at the hearing that he still has alcohol in his house and still serves his friends alcohol when they visit him. *Id.* at 39. When asked by the DOE Counsel what his future intentions are with regard to alcohol, the individual responded, "I can either continue or have maybe one beer on occasion, six a year, or completely quit, I can go to AA, I can follow the recommendations you may have for me." *Id.* at 54. Later in his testimony, the individual stated, "I guess I'll just completely quit. I'll probably go ahead and speak with a recovery program. . ." *Id.* at 55.

The individual also tendered into the record the results of numerous drug and alcohol tests that he took between 1998 and 2004. *See* Ex. A-H. Of relevance to this case are the two random breath alcohol tests conducted on the individual in 1998 and 2000. Ex. C, E. Both of those tests yielded negative results.

In addition, the individual submitted complimentary letters of recommendation dated 1981, 1984, 1995, and 1996. *See* Ex. K-O, U. Finally, the individual tendered positive job evaluations for the year 1995. *See* Ex. P, Q.

B. Three Managers' Testimony

Three managers testified on the individual's behalf at the hearing. Manager #1 testified that the individual works in his area. Tr. at 68. He related that he sees the individual on a daily basis at work. *Id.* at 69. Manager #1 testified that the individual produces good work product and is a reliable employee. *Id.* at 72.

Manager #2 testified that the individual is a very conscientious employee. *Id.* at 80. Manager #2 further testified that he never saw any indication at work that the individual had an alcohol-related problem. *Id.*

Manager #3 supervised the individual for an 18-month period, from April 2001 until December 2003. *Id.* at 134. During that time, Manager #3 never saw any indication that the individual had any kind of alcohol problem. *Id.* Manager #3 testified that the individual was a good, conscientious employee during the time the individual worked for him. *Id.* at 136.

C. The DOE consultant-psychiatrist's Testimony

The DOE consultant-psychiatrist listened to the testimony of the individual and Manager # 1 and # 2 before he testified. At the hearing, the DOE consultant-psychiatrist affirmed his opinion that the individual suffers from alcohol abuse. *Id.* at 88. He then highlighted information that he has learned since the 2003 psychiatric examination that he deems to be positive factors in the individual's recovery efforts. Those positive factors are the following: (1) the individual is drinking less, (2) the individual now realizes that alcohol has presented problems for him in the past, (3) the individual was honest about his recent

consumption of alcohol, (4) the individual has had no problems with alcohol in the past year, and (5) the individual is making progress in addressing his alcohol issues. *Id.* at 114. The DOE consultant-psychiatrist also pointed out information that is not favorable to the individual with regard to his rehabilitation and reformation efforts. The negative factors are the following: (1) the individual just recently recognized the problems that alcohol has caused him, (2) the individual has not voluntarily undergone any outpatient treatment,⁹ (3) the individual ignored advice to abstain from alcohol that an alcohol counselor gave him in 2003, and (4) the individual gave the DOE assurances in the past that he would stop consuming alcohol but did not. *Id.* at 118-119. Finally, the DOE consultant-psychiatrist opined that the likelihood is fairly significant that, without treatment, the individual will relapse within one to two years. *Id.* at 118. In the end, the DOE consultant-psychiatrist opined that the individual must maintain his sobriety and remain in treatment for one year before he could consider him reformed or rehabilitated. *Id.* at 120.

D. Hearing Officer Evaluation of Evidence

Based on the record before me, it appears that the individual has just begun his journey towards achieving rehabilitation and reformation from his alcohol abuse. It is positive that the individual now recognizes that alcohol has had a negative impact on his life. He needs, however, to take more affirmative steps before I could be convinced that he is rehabilitated or reformed from his alcohol abuse.

In evaluating the evidence in this case, I accorded much weight to the individual's past statements to the DOE with regard to his future intentions regarding alcohol. In 2001, the LSO conducted a PSI with the individual (2001 PSI). During the 2001 PSI, the interviewer questioned the individual about his past use of alcohol. The individual told the LSO that "I'm much more conscious, I don't drink and drive." Ex. 11 at 72. One year later, however, the individual was arrested for DUI. In 2003, the LSO conducted another PSI with the individual. During the 2003 PSI, the interviewer asked the individual about his future intentions regarding alcohol. Ex. 8 at 72. The individual responded as follows: "I'll probably just quit, stay away from it. Not gonna say I'll never have a beer but don't have intentions of so doing." *Id.* At the hearing, the individual revealed that he had consumed alcohol between March 2003 and December 2004. Tr. at 31. At the hearing, the individual was asked once again to state his future intentions with regard to alcohol. His response was equivocal, in my opinion, and lacked conviction.¹⁰

It is unfortunate that the individual chose not to call his wife as a witness. While the individual claims that his wife is his coach (*id.* at 116) for purposes of alcohol recovery, I am left to guess how the individual's wife is supporting his efforts at sobriety. Similarly, it might have been helpful if the individual had either called the alcohol counselor whom

⁹ The DOE consultant-psychiatrist points out that the treatment that the individual has received to date was not voluntary but rather ordered by the court. *Id.* at 117.

¹⁰ Specifically, the individual testified as follows: "I can either continue to have maybe one beer on occasion, six a year, or completely quit, I can go to AA, I can follow the recommendations you may have for me." *Id.* at 54. Later in his testimony, the individual stated, "I guess I'll just completely quit. I'll probably go ahead and speak with a recovery program." *Id.* at 55.

he saw in 2003 or provided documentation regarding his 12 sessions with the counselor. In the absence of any information regarding the 2003 counseling, I am unable to accord any weight to it. Moreover, I am concerned that the individual still has alcohol in his house and that he serves alcohol to his guests who visit his home. While the individual may have the self discipline to remain abstinent despite the temptation of having alcohol in his presence, it is my opinion that the individual's resolve will certainly be tested. Finally, I gave considerable weight to the DOE consultant-psychiatrist's assessment that the likelihood is fairly significant that the individual will relapse within one to two years if he does not receive the treatment recommended by the DOE consultant-psychiatrist. In this regard, I note that the DOE consultant-psychiatrist has recommended that the individual remain abstinent and receive one year of outpatient alcohol treatment. As of the date of the hearing, the individual had been abstinent for only a few weeks and was not enrolled in any outpatient alcohol treatment program.

In the end, after carefully weighing all the evidence carefully, I find that the individual has not brought forth sufficient evidence to mitigate the security concerns predicated on Criterion J in this case.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion J. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to mitigate the security concerns advanced by the LSO. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: March 14, 2005